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No. 88-150

In the Supreme Court of the United States

OCTOBER TERM, 1988

MILDRED IRVIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the courts below erred in dismissing under *Feres* v. *United States*, 340 U.S. 135, 146 (1950), their claims based on the allegedly negligent prenatal care afforded petitioner Mildred Irvin while she was on active duty in the United States Army.

1. Petitioners Mildred and Silas Irvin are the parents of Quintessa Irvin, who died in August 1984, four days after her birth. At that time, both Mr. and Mrs. Irvin were on active duty in the Army. They brought this suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, 2671-2680, contending that negligent prenatal medical treatment by the Army had led to Quintessa's premature birth and her death. Petitioners have not alleged that Quintessa was treated negligently following her birth. Pet. App. A2-A3.

The district court dismissed the complaint (Pet. App. B1-B3). The court first noted that, under *Feres*, the FTCA does not provide relief for injuries incurred incident to military service (*id.* at B2). Mildred Irvin's individual claim, the court then held, "falls squarely into the incident to service test" (*ibid.*) since *Feres* itself involved medical malpractice claims. The court further concluded that petitioners could not recover as parents and next friends for the *in utero* injuries suffered by Quintessa. The court agreed with the Fifth Circuit's conclusion in *Scales* v. *United States*, 685 F.2d 970, 974 (1982), cert. denied, 460 U.S. 1082 (1983), another case involving *in utero* injuries to the child of a servicewoman, that "the 'treatment accorded [the] mother is inherently inseparable from the treatment accorded . . . a fetus in [the] mother's body' " (*id.* at B3).

The court of appeals affirmed (Pet. App. A1-A10). With respect to Mildred Irvin's individual claim, the court noted that the Ninth Circuit had withdrawn its opinion in *Atkinson* v. *United States*, 804 F.2d 561 (1986), on which petitioners had relied, where the court found that a servicewoman could bring suit challenging medical treatment during pregnancy. Following this Court's decision in *United States* v. *Johnson*, No. 85-2039 (May 18, 1987), which reaffirmed the rule of *Feres*, the Ninth Circuit held that such claims are barred by *Feres*. *Atkinson* v. *United States*, 825 F.2d 202, 206 (9th Cir. 1987), cert. denied, No. 87-781 (Apr. 4, 1988). The court below next noted that "[t]wo additional circuits have also held that the servicewoman mother's claims were barred by the *Feres* doctrine in analogous prenatal care medical malpractice cases." Pet. App. A7 (citing *Del Rio* v. *United States*, 833 F.2d 282, 286 (11th Cir. 1987), and *Scales*, 685 F.2d at 973). The court held that "Ms. Irvin's individual claim is barred

under a straightforward reading of *Feres*" since she "was on active duty in the United States Army during the time in question, and the injuries to her arose out of or were in the course of activity incident to service" (Pet. App. A7-A8).

The court also held that *Feres* barred petitioners' claims brought as Quintessa's parents and next friends. The court noted that the courts of appeals have generally concluded that *Feres* bars "claims of dependents of servicemen where the claim has its 'genesis' in an injury to a serviceperson incident to military service" (Pet. App. A8). The court adopted that test. Like the district court, it agreed with the Fifth Circuit's conclusion that injury to a fetus " 'is inherently inseparable from the treatment' " accorded the mother. *Id.* at A9 (quoting *Scales*, 685 F.2d at 974).

2. Petitioners contend (Pet. 9) that review is warranted because the decision below conflicts with the Ninth Circuit's decision in *Atkinson* and the Eleventh Circuit's decision in *Del Rio*. They also suggest (Pet. 10) that it is contrary to this Court's decision in *Johnson*. There is no merit to those contentions. The decision below is fully consistent with *Johnson*, and the Ninth Circuit's conflicting decision in *Atkinson* has been withdrawn. While the court below did approach the question presented differently than did the Eleventh Circuit in *Del Rio*, review is not warranted to resolve that disagreement.

a. The courts below were plainly correct in holding that Mrs. Irvin's individual medical malpractice claim is barred. In *Johnson*, the Court reaffirmed that "service members cannot bring tort suits against the Government for injuries that 'arise out of or are in the course of activity incident to service.' " Slip op. 4 (quoting *Feres*, 340 U.S. at 146). As the Court noted, "the *Feres* doctrine has been applied consistently to bar all suits on behalf of service

members against the Government based upon service-related injuries" and specifically "decline[d] to modify the doctrine at this late date" (slip op. 6-7). The three consolidated cases decided by this Court in *Feres* included two medical malpractice claims, and this Court held that such claims are barred. The Ninth Circuit's contrary decision in *Atkinson* (804 F.2d 561), on which petitioners rely, was withdrawn following this Court's decision in *Johnson* (825 F.2d at 206), so there is no conflict in the courts of appeals.

b. The courts below also correctly concluded that petitioners' claims brought as Quintessa's parents and next friends are barred. In determining whether an injury to a dependent of a servicemember arose "incident to service," the lower courts have generally applied what the court below termed the "genesis" test. That test originated in *Van Sickel* v. *United States*, 285 F.2d 87 (9th Cir. 1960), where the dependents of a serviceman who died following an operation at a military hospital sought recovery for wrongful death. The court of appeals held that the claim was barred by *Feres*, even though under state law the dependents had an independent cause of action that accrued upon the death of their husband and father, because "its genesis must go back to the in-service injury alleged to have been sustained by him due to the negligence of others in the armed services" (285 F.2d at 91).

Under the genesis test, claims on behalf of the dependents of service members are held not to be barred where the dependent was himself negligently treated by military medical personnel. See, *e.g.*, *Burgess* v. *United States*, 744 F.2d 771 (11th Cir. 1984) (serviceman's child received post-delivery injury at army hospital); *Portis* v. *United States*, 483 F.2d 670 (4th Cir. 1973) (malpractice suit by serviceman's child treated in a military hospital).

However, where the injury to a dependent derived from the treatment of a service member, as in *Van Sickel*, the lower courts have held that the claim is barred. Thus, claims for mental anguish and loss of companionship on behalf of dependents of service members consistently have been held to be barred where the injury or death of the service member was service-related. See, *e.g.*, *De Font* v. *United States*, 453 F.2d 1239 (1st Cir.), cert. denied, 407 U.S. 910 (1972) (barring serviceman's wife's claim for mental anguish and child's claim for loss of companionship); *Harrison* v. *United States*, 479 F. Supp. 529 (D. Conn. 1979), aff'd, 622 F.2d 573 (2d Cir.) (Table), cert. denied, 449 U.S. 828 (1980) (barring wife of serviceman's claim for loss of consortium). Similarly, a number of courts have held that claims based on physical injuries to dependents of military personnel caused by the exposure of their fathers to radiation while they served in the armed forces are barred by *Feres*. See, *e.g.*, *Mondelli* v. *United States*, 711 F.2d 567, 569 (3d Cir. 1983), cert. denied, 465 U.S. 1021 (1984) (child's cancer allegedly caused by service member father's exposure to radiation); *Monaco* v. *United States*, 661 F.2d 129, 133-134 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982) (child's genetic defects resulted from service member father's exposure to radiation).

The lines drawn by the lower courts through the genesis test sensibly apply the incident to service test of *Feres* to cases involving dependents. As this Court stated in *Johnson*, "a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission" (slip op. 9). It would plainly make no sense to bar a service member from bringing a negligence suit challenging a military decision that led to an injury, while at the same time permitting the service member's

dependent to bring suit challenging the same decision on the ground that it indirectly caused mental anguish or physical injury to the dependent.

Furthermore, the genesis test is a reasonable application of this Court's decision in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977). In *Stencel Aero*, a military pilot, injured when his ejection system malfunctioned, sued the manufacturer, which in turn sued the United States. This Court held that the manufacturer's claim was barred because the underlying injury was suffered incident to military service. While, as the court below noted (Pet. App. A8), *Stencel Aero* involved a derivative claim rather than a derivative injury, that difference should lead to no different result. The fact that an injury was suffered incident to military service means that a trial arising out of that injury would "involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions" (431 U.S. at 673), whether the suit was based on a derivative claim or a derivative injury.

As applied to the unusual factual situation presented here—negligent treatment of an active duty servicewoman that allegedly harmed her fetus, with no claim that the child suffered any post-delivery injury—the genesis test reasonably leads to the result reached by the courts below and the Fifth Circuit in *Scales*. Under *Feres*, as we have shown, a servicewoman is plainly barred from suing on the basis of any injury to herself resulting from malpractice. Since any injury to the fetus necessarily resulted from the treatment of the mother, it is, as the courts below stated, " 'inherently inseparable from the treatment' " of the servicewoman. Pet. App. Ap, B3 (quoting *Scales*, 685 F.2d at 974). Moreover, as the court below stated, whether the

claim was brought on behalf of the mother or the child, " 'the judge is placed in the position of questioning the propriety of decisions or conduct of fellow members of the Armed Forces,' " which " 'is precisely the type of examination that *Feres* seeks to avoid.' " Pet. App. A10 (quoting *Scales*, 685 F.2d at 974).

c. The Eleventh Circuit followed a different approach in *Del Rio*, which also arose out of allegedly negligent prenatal care of a servicewoman. The court did not apply the "incident to service" test of *Feres* and the "genesis" test familiar in cases involving dependents, but instead analyzed the claim in light of the various rationales underlying the rule. It concluded that the servicewoman could not bring a claim on her own behalf (833 F.2d at 286) or a wrongful death claim on behalf of her twin child who died five days after birth (*id.* at 288), but could bring suit on behalf of the twin child who lived but was injured as a result of the allegedly negligent prenatal treatment (*id.* at 287).

Review is not warranted on account of the disagreement in approach between the decision below and the decision in *Del Rio*. As an initial matter, there is no disagreement in result since, in both cases, claims by a servicewoman on her own behalf and on behalf of a child who died as a result of allegedly negligent prenatal care were held to be barred. While, contrary to the Eleventh Circuit's decision, application of the genesis test would lead to the result that a claim may not be brought on behalf of a child injured as a result of negligent prenatal care who survives, that issue is not presented here. Moreover, the approach in *Del Rio* was plainly wrong. The rationales underlying the rules of *Feres* are not factors in a test to be applied on a case-by-case basis to determine whether a claim is barred, yet that is how the Eleventh Circuit analyzed the case. In its decision in *Johnson* v. *United States*, 749 F.2d 1530 (1985),

reinstated, 779 F.2d 1492 (1986) (en banc), the Eleventh Circuit also adopted a case-by-case approach to determine whether the suit at issue would tend to undermine military discipline and effectiveness (749 F.2d at 1537), the primary rationale underlying the rule. This Court reversed, reiterating that the test is whether the injury was suffered incident to military service (slip op. 4). See also *United States* v. *Stanley*, No. 86-393 (June 25, 1987), slip op. 11. That test was properly applied by the courts below, so review by this Court is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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